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No. 93-225

In The

Supreme Court of the United States

October Term, 1993

ST. GEORGE "DIXIE" LODGE #1743,
BENEVOLENT & PROTECTIVE ORDER OF ELKS,

Petitioner,

v.

SANDRA BEYNON,

Respondent.

On Petition For A Writ Of Certiorari To The Utah Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

Does Petitioner's First Amendment associational right supersede the power of the State of Utah to regulate the sale or use of alcohol as guaranteed by the Twenty-first Amendment?

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Respondent, Sandra Beynon, by and through her counsel of record, hereby submits her brief in opposition to the petition for a writ of certiorari.

COUNTER STATEMENT OF THE CASE

The Petitioner, the St. George, Utah affiliate of the national Benevolent & Protective Order of Elks (hereinafter the "Elks") holds a Utah state issued private liquor club license. Petitioner's Brief, p. 7. That license allows the Elks to sell liquor to its members and guests. *Id.*

In order to secure a private liquor club license from the State of Utah an entity must be a non-profit corporation and must be private, that is, it must be selective in its membership policies. Ut. Code Ann. § 32A-5-102 (1953 as amended); *Beynon v. St. George "Dixie" Lodge*, Petitioner's Brief, pp. A-11, A-12.

One specific statutory requirement for the issuance of a private club liquor license is that the entity must agree not to violate any Utah laws. Ut. Code Ann. § 32A-5-105(2)(c) (1953 as amended); Petitioner's Brief, p. A-24.

The Utah Civil Rights Act, Ut. Code Ann. § 13-7-1 et seq. (1953 as amended) prohibits gender discrimination in any enterprise that is regulated by the state. Ut. Code Ann. §§ 13-7-1 et seq (1953 as amended); Petitioner's Brief, p. 8. An entity granted a private liquor club license by the State of Utah is an enterprise regulated by the state subject to the provisions of the Utah Civil Rights Act. Ut. Code Ann. § 13-7-3 (1953 as amended); Petitioner's Brief, p. A-11.

Except for Sandra Beynon's application, no membership request had been rejected for two and one-half years before this suit was filed. The St. George Elks has approximately 1,056 members,[1] and no limit exists for the number of men who may join. In fact, men are actively recruited and encouraged to join. Petitioner's Brief, p. A-3.

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[1] Based on 1989 statistics.

The Elks' facilities include a restaurant/bar open to members, their families, and guests. Dinner is served three nights a week, and lunch is served daily, including Sunday brunch. Non-members rent the Elks facilities for weddings, parties, and business meetings. The only requirement for use of the facilities is that a member sponsor and attend the event. Petitioner's Brief, pp. A-3, A-4. In the fiscal year 1986, the Elks earned $25,197.00 from rental of its facilities.

The Elks has a St. George City business license and a private club liquor license under the Utah Alcoholic Beverage Control Act (hereinafter the "ABCA").[2] The liquor license allows the Elks to sell alcohol to its members and their guests. The Elks sells more than $250,000.00 worth of alcoholic beverages annually. Petitioner's Brief, p. A-4.

The stated purpose of the Elks is to promote friendship and fraternal affiliation among its members and to engage in charitable work. The Elks annually sponsors numerous charitable and social activities in the St. George area. Each Tuesday night the Elks holds a private meeting where the members discuss business and perform certain rituals. That weekly meeting is the only Elks function from which non-members are barred. Petitioner's Brief, p. A-5.

The Utah Supreme Court held that the plain language of the Utah Civil Rights Act, Utah Code Annotated

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[2] Utah Code Ann. §§ 32A-1-101 to -124, 32A-5-101 to -108; Petitioner's Brief, p. 46.

§ 13-7-2(c)(2) (1953 as amended) contemplates that entities regulated by the ABCA are subject to the anti-discrimination provisions of the Act. An entity that applies for and receives a state liquor license under the ABCA subjects itself to the provisions of the Utah Civil Rights Act by accepting the license. The ABCA imposes extensive regulatory control over the sale and consumption of alcoholic beverages in Utah. Under the ABCA *all* clubs in Utah that dispense alcoholic beverages *must* be both nonprofit[3] and private.[4] Petitioner's Brief, pp. A-11, A-12. Under the ABCA and the Utah Civil Rights Act, the Elks is no different than any other private eating and drinking club in Utah. Petitioner's Brief, p. A-13.

Under the ABCA, any entity seeking a private club liquor license must submit itself to the intense regulation imposed by the state legislature. One of the many requirements under the ABCA is that licensees must not violate any law or ordinance.[5] The Elks voluntarily elected to abide by the laws of Utah, including the Utah Civil Rights Act, when it applied for and received a private club liquor license. Petitioner's Brief, p. A-24.

The Utah Supreme Court held that the Elks may not discriminate on the basis of gender as long as it accepts and benefits from a state-issued liquor license. Petitioner's Brief, pp. A-25, A-26.

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[3] Utah Code Ann. §§ 32A-5-102(1)(e), 32A-5-105(1); Petitioner's Brief, p. A-12.

[4] *Id.* § 32A-5-107(2); Petitioner's Brief, p. A-12.

[5] Utah Code Ann. § 32A-5-105(2)(c); Petitioner's Brief, pp. A-10, A-11.

The Utah Supreme Court specifically noted that the unique and highly regulatory scheme of the ABCA present in this case was not present in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987), decided by this Court and which considered gender discrimination and associational rights under the First Amendment. Petitioner's Brief, p. A-27.

As long as the Elks holds a private club liquor license, the Utah Supreme Court held it must comply with the anti-discrimination provisions of the Utah Civil Rights Act. Petitioner's Brief, p. A-27.

SUMMARY OF ARGUMENT

This case has little significance beyond the boundaries of Utah. Under the Supreme Court Rules, there is no reason to revisit the issue presented herein. This Court's rulings in *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987) and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) have resolved the constitutional issue as framed by Petitioner. The compelling state interest in ending gender discrimination may constitutionally be allowed to cause minor incursions into associational rights protected by the First Amendment.

Petitioner's associational right does not supersede the right of the State of Utah to regulate the use of alcohol. The Twenty-first Amendment to the United States Constitution grants the State of Utah broad powers to regulate sales and use of alcohol. Prior Supreme Court cases establish that states may constitutionally limit First

Amendment freedoms while exercising their Twenty-first Amendment powers to license liquor-selling establishments.

Finally, Petitioner's associational interests are not within the scope of First Amendment protection. This Court's prior decisions have established that First Amendment protection of freedom of association extends only to truly private entities. This Court found that the Rotary Club and the Jaycees, two (2) private organizations similar to Petitioner lacked sufficient intimacy to afford them the constitutional privacy protection granted to family-like relationships. *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Petitioner is neither intimate nor selective enough to qualify for the First Amendment protection that is given to truly private clubs.

This Court's prior decisions have already resolved the issue presented herein by Petitioner. The State's compelling interest in ending gender discrimination allows it to impinge on Petitioner's First Amendment associational rights. When the State of Utah regulates alcohol, the State also possesses the Twenty-first Amendment power to limit Petitioner's First Amendment rights. Finally, the First Amendment's protection of associational freedom does not extend to non-selective, non-intimate, clubs such as that of Petitioner. This Court should deny the petition for a writ of certiorari.

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ARGUMENT: REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT AN IMPORTANT OR BROAD REACHING ISSUE TO BE CONSIDERED BY THIS COURT.

This action does not involve an issue that this Court typically considers. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1 (1993). No such "special and important reasons" are implicated in the instant case. The issue herein does not involve any conflict between different state courts of last resort. Sup. Ct. R. 10.1(a)-(b). The Utah Supreme Court decision in the instant case does not involve an "important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). The Utah Supreme Court's decision in the instant case fully followed applicable decisions of this Court. *Id.*

The issue herein has already been considered and resolved by this Court against petitioner's position. In two (2) cases, not involving the sale and licensing of alcohol, *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987) and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court determined that the First Amendment right of association may be circumscribed by a compelling state interest such as ending gender discrimination. *Rotary*, 481 U.S. at 549 (civil rights statute forbidding gender discrimination did not violate male Rotary members' expressive association rights); *Roberts*, 468 U.S. at 623 (Minnesota's compelling state interest in eradicating discrimination justified interference with male Jaycee members' associational freedoms).

The additional state interest in regulating the sale of liquor and the broad powers granted to states to do so, which are present in this case, mean that the issues decided in *Roberts* and *Jaycees* against gender discrimination, must inexorably be decided against the Elks in this case.[6]

This action involves a straightforward application of the Twenty-first Amendment to state regulation of the sale and licensing of alcohol. This action involves the interpretation of a state liquor licensing statute and a state civil rights act unique to the State of Utah.

Although Petitioner spreads upon ninety (90) pages of its brief (Petitioner's Brief, pp. A-157 – A-247) the names of many hundreds of world wide organizations that discriminate in their membership, Petitioner fails to note that only two (2) of those organizations (the Elks and the Moose) have private club liquor licenses issued by the State of Utah. A Utah state issued liquor license and the concomitant regulations are the controlling facts relative to this action.

This case does not deserve the attention of this Court.

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[6] The Utah Supreme Court noted, "the unique and highly regulatory scheme of the ABCA [Utah Alcohol Beverage Control Act] at issue here was not present in *Roberts, Rotary International,* or any other case cited by the parties." *Beynon v. St. George Elks,* Petitioner's Brief, p. A-59.

II. THE TWENTY-FIRST AMENDMENT REQUIRES THAT APPLICANTS FOR STATE LIQUOR LICENSES OBEY STATE LAWS.

The Twenty-first Amendment endows the State of Utah with broad police powers in regulating alcohol.

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. Amend. XXI, § 2. The Twenty-first Amendment states that anyone who seeks a state liquor license must adhere to the laws of the issuing state.

Allowing Petitioner to violate the Utah Civil Rights Act while it possesses a Utah State liquor license would emasculate the Twenty-first Amendment. Enactment of the Utah Civil Rights Act vis-a-vis state liquor licenses was a valid exercise of the police and constitutional powers of the State of Utah. Petitioner agreed to comply with such enactments when it applied for a State liquor license. Petitioner may not now exempt itself from Utah State laws, just because it disagrees with or finds such laws inconvenient. Under the Twenty-first Amendment, Petitioner may be forced to uphold all Utah State laws in order to maintain its State liquor license.

III. THE COURT HAS ALREADY DECIDED THAT STATES' TWENTY-FIRST AMENDMENT RIGHTS TO REGULATE THE SALE AND USE OF ALCOHOL SUPERSEDE FIRST AMENDMENT RIGHTS.

The State of Utah has not impermissibly infringed on Petitioner's associational right. Previous decisions by this Court cases establish that states' power to control the manner and circumstances under which liquor may be dispensed includes the power to limit the exercise of First Amendment freedoms.

Under the Twenty-first Amendment, states have the power to regulate liquor sales, even where such regulations interfere with First Amendment rights. In *California v. LaRue*, 409 U.S. 109 (1972), this Court clarified states' regulatory powers under the Twenty-first Amendment. In *LaRue*, the State of California's Department of Alcohol Beverage Control promulgated regulations regarding the type of entertainment that state-licensed bars and nightclubs could present. *Id.* at 110. The regulations prohibited actual or simulated sexual acts, the actual or simulated display of pubic hair, anus, or genitalia, or films showing the prohibited acts. *Id.* at 111-112. The Court in *LaRue* noted that the State's regulations "would proscribe some forms of visual presentation" that would otherwise be protected by the First Amendment. *Id.* at 116. However, the Court held that states "may validly limit the manner in which the First Amendment freedoms are exercised." *Id.* at 116 n. 4. Further, the Court found as a "critical fact" that California's regulations did not prohibit nude performances everywhere, only in establishments licensed to sell liquor. *Id.* at 118. The Court concluded

> Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.

Id. at 118-119.

No subsequent decision of this Court has limited states' rights to regulate circumstances surrounding the sale and use of alcohol. In *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), this Court followed *LaRue*. In *Bellanca*, the New York State Liquor Authority prohibited topless dancing in establishments licensed by the State to serve alcohol. *Id.* at 714. This Court found that the State had not attempted to ban topless dancing in all public places in the State, only in establishments where liquor was served. *Id.* at 716. The Court concluded that the Twenty-first Amendment gave the state legislature powers to regulate liquor establishments that could override whatever artistic or communicative qualities may attach to topless dancing. *Id.* at 718. In 1986, this Court followed *LaRue* and *Bellanca* in a similar alcohol regulation case. *Newport v. Iacobucci*, 479 U.S. 92 (1986).

This Court has found liquor regulations to violate the First Amendment only when the State has vested the power to regulate in constitutionally inappropriate third parties. This Court in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) found that vesting churches with the power to veto liquor license applications impermissibly impinged upon the Establishment Clause of the First Amendment. *Id.* at 126. However, the Court pointed out that the holding does not limit states' regulatory rights with regard to liquor licenses. *Id.* at 122. In fact, the Court said that

states could legislatively ban all sales of alcohol in close proximity to churches, without violating the First Amendment. *Id.* at 123-124 (*See also California v. LaRue*, 409 U.S. at 119-120 (Stewart, J., concurring) (although the First Amendment prohibits states from interfering with freedom of the press or free exercise of religion, the Twenty-first Amendment empowers a State to prohibit alcohol from being sold in bookstores or within two hundred (200) feet of a church)). This Court has upheld states' exercise of their Twenty-first Amendment power to regulate the sale of alcohol, even where such regulations interfere with First Amendment freedoms.

In the instant case, the State of Utah has valid power under the Twenty-first Amendment to condition the granting of Petitioner's liquor license upon Petitioner's willingness to waive certain First Amendment freedoms and to uphold Utah State law. Like California in *LaRue* and New York in *Bellanca*, the State of Utah has not placed any direct restrictions on any rights protected by the First Amendment. Petitioner may discriminate against women if it relinquishes its liquor license, which it is free to do. Further, this Court's reasoning in *LaRue* compels a presumption of the validity of the State of Utah requirement that establishments selling liquor shall not violate the Utah Civil Rights Act. This Court has firmly established that a state may impinge upon First Amendment rights when regulating circumstances surrounding the sale and consumption of alcohol.

IV. THE FIRST AMENDMENT GUARANTEES OF FREEDOM OF ASSOCIATION DO NOT PROHIBIT APPLICATION OF THE UTAH CIVIL RIGHTS ACT TO THE ELKS LODGE.

This Court has established that First Amendment protection of freedom of association extends only to truly private clubs. Petitioner is not a truly private club. Petitioner maintains a public and commercial profile, profiting from the state licensed sale of beer and liquor and from the rental of its facilities to the public. Because Petitioner itself sought state regulation, it cannot simultaneously claim immunity from state anti-discrimination supervision.[7]

Petitioner is not entitled to First Amendment protection because it is not a small, selective organization. This Court has consistently held that the essence of privacy is selectivity. *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431, 438 (1973); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969).

This Court refused to extend constitutional protection to association among members of the Rotary Club and the Jaycees, two (2) private organizations similar to Petitioner's club, because these groups lacked intimacy sufficient to provide them the privacy protection afforded

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[7] If, as now claimed by Petitioner, the central activity of the Petitioner's lodge is the ritualistic Tuesday night meeting, during which no alcohol is served or present, (Petitioner's Brief, p. 6; p. 51), the relinquishment of its state issued private liquor club license would not affect the functioning and central purpose of Petitioner.

to family-like relationships. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). If there is little or no selectivity in a club's membership, there is no basis to claim privacy. *Bd. of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987); *Roberts*, 468 U.S. 609. Like the Petitioner in the instant case, both the Rotary Club and Jaycees organization founded their First Amendment claims on assertions that they maintained selective membership criteria. This Court has already twice rejected this argument.

The Elks is an organization with a large membership and without a genuinely selective membership procedure. The St. George Elks Lodge is not a truly private club. Although Petitioner lists ten (10) characteristics as its membership standards (Petitioner's Brief pp. 10-11), these criteria do not create a selective, intimate organization. Most,[8] if not all, men who apply are allowed to join the Elks. At various Lodge meetings, Elks members are encouraged to recruit new members. *Id.* at A-3. Although the Elks can have members only from Washington County, Utah and small adjoining areas of Nevada and Arizona, the lodge enjoys a large membership of one

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[8] Three (3) long time members of the St. George Elks testified that during their respective thirty-one (31), thirty-eight (38), and twenty-nine (29) years of membership, they witnessed respectively, the rejection of no applications, maybe ten (10) applications, and one (1) application for membership.

From January, 1987 through June, 1989, the St. George Elks members approved every application for membership presented to them (except Respondent's). During those two and one-half years, the investigation committee, whose duty is to review the qualifications of all applicants, never issued a negative report on any applicant. Petitioner's Brief, p. A-3.

thousand fifty-six (1,056) men. This figure represents more than 5% of the male population in Washington County, Utah and more than 8% of the male population in the City of St. George.[9] There is no limit on the number of men that can be members of the Elks. *Id.*

Because Petitioner has not conducted itself as a truly private club, it cannot claim First Amendment immunity from the reach of the Utah Civil Rights Act. Rather than maintaining selective membership standards, Petitioner has solicited and encouraged a large membership and has admitted virtually every male that has wished to join. By offering its facilities for rent and by running a restaurant in which non-member guests can purchase food and alcohol, Petitioner has lost any basis for a claim of protected privacy. Finally, Petitioner has accepted a state license to sell beer and alcohol, voluntarily submitting to the government supervision which often befalls beneficiaries of state privileges. No truly private organization invites a state regulating body into its inner sanctum.[10] Contrary

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[9] The 1988 population of Washington County, Utah was 38,600 and that of the City of St. George, Utah was 25,000. Respondent assumes that one/half of these county and city residents were male. The actual percentage of the eligible general population which are members of the Elks is substantially more than 5% and 8% in light of that fact that not all male residents are over the age of twenty-one, which is one of the requirements for membership in a private liquor club in Utah. An organization that includes as its members more than ten percent (10%) of the eligible males within its municipal location, seems difficult to describe as private, intimate and selective.

[10] As part of the application for its state liquor license, the Elks consented to permit any authorized representation of the liquor commission or any law enforcement officer the "unrestricted right

to Petitioner's argument, the Elks is not "an extension of one's home," because in Utah no one can sell beer or liquor in their home.[11]

CONCLUSION

This case does not present any important federal issues to be settled by this Court. This Court decided in prior cases that states may constitutionally limit First Amendment rights when eradicating gender discrimination. More importantly, the Twenty-first Amendment grants states broad regulatory powers with regard to alcohol. This Court established that Twenty-first Amendment regulatory powers include the power to infringe on Petitioner's First Amendment interests. Finally, Petitioner's associational interests are not of a type protected by the First Amendment.

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to enter the club premises." Ut. Code Ann. § 32A-5-102(1) (1953 as amended); Petitioner's Brief, p. A-100. Such a voluntary waiver of Fourth Amendment rights is no more onerous or unconstitutional, than the encroachment upon Petitioner's First Amendment associational rights occasioned by the Utah Civil Rights Act.

[11] Additionally, it would be a very busy home indeed that annually sold a quarter million dollars worth of liquor.

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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